

Jeffrey N. Pomerantz (CA Bar No. 143717)  
Debra I. Grassgreen (CA Bar No. 169978)  
John W. Lucas (CA Bar No. 271038)  
PACHULSKI STANG ZIEHL & JONES LLP  
150 California Street, 15<sup>th</sup> Floor  
San Francisco, California 94111-4500  
Telephone: 415.263.7000  
Facsimile: 415.263.7010  
Email: jpomerantz@pszjlaw.com  
dgrassgreen@pszjlaw.com  
jlucas@pszjlaw.com

Proposed Attorneys for Debtor and  
Debtor in Possession

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

In re:  
Tri-Valley Learning Corporation,<sup>1</sup>  
Debtor.

Case No.: 16-43112-CN  
Chapter 11

**MOTION FOR ENTRY OF AN ORDER  
AUTHORIZING (1) REJECTION OF  
NON-RESIDENTIAL REAL PROPERTY  
LEASE LOCATED IN LIVERMORE,  
CALIFORNIA, AND (2) ABANDONMENT  
OF REMAINING PERSONAL  
PROPERTY PURSUANT TO 11 U.S.C.  
§§ 365 AND 554; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

Tri-Valley Learning Corporation (“**TVLC**” or the “**Debtor**”), the above-captioned debtor and debtor in possession, hereby files this Motion (the “**Motion**”) for entry of an order rejecting the unexpired non-residential real property lease (together with any amendments and modifications, the “**Lease**”) by and between the Debtor, as lessee, and Darim Vision, Inc., as lessor (“**Darim**” or “**Lessor**”) for the premises located at 3110 Constitution Drive, Livermore, CA 94551 (the “**Premises**”).

The Motion is made on the grounds that the Debtor has vacated the Premises by the Petition Date (as defined below) and the Lease is not necessary for the Debtor’s continued operations. The Motion is based on the Memorandum of Points and Authorities set forth herein, the *Notice of*

<sup>1</sup> The last four digits of the Debtor’s tax identification number is (4585). The location of the Debtor’s service address is 3252 Constitution Drive, Livermore, CA 94551.

1 *Hearing on First Day Motions* (“**Omnibus Notice**”), the *Declaration of Lynn Lysko in Support of*  
2 *First Day Motions* (the “**First Day Declaration**”) filed concurrently herewith and fully incorporated  
3 herein by reference, the pleadings and papers on file herein, and such other oral or documentary  
4 evidence as may be submitted before the Court.

5 In support of the Motion, the Debtor respectfully represents the following:

6 **I.**

7 **JURISDICTION**

8 The Court has jurisdiction over the matter pursuant to 28 U.S.C. §§ 157 and 1334. This  
9 matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper pursuant  
10 to 28 U.S.C. §§ 1408 and 1409.

11 The statutory bases for the relief requested herein are sections 365 and 554 of title 11 of the  
12 United States Code (the “**Bankruptcy Code**”) and Rule 3002(c)(4) of the Federal Rules of  
13 Bankruptcy Procedure (the “**Bankruptcy Rules**”).

14 **II.**

15 **SUMMARY OF RELIEF SOUGHT**

16 By this Motion, the Debtor seeks the entry of an order, in substantially the form annexed  
17 hereto as **Exhibit A**, (a) approving the rejection of the Lease effective as of the Petition Date  
18 pursuant to section 365 of the Bankruptcy Code, (b) establishing, pursuant to Bankruptcy Rule  
19 3002(c)(4), the later of (i) 30 days after entry of an order granting this Motion or (ii) the deadline set  
20 by the Court for a prepetition claim to be filed, as the claims bar date for claims arising from  
21 rejection of the Lease, and (c) authorizing the abandonment of personal property of the Debtor’s  
22 estate, if any, remaining at the Premises pursuant to section 554 of the Bankruptcy Code.

23 **III.**

24 **MOTION**

25 **A. Background**

26 On the date hereof (the “**Petition Date**”), the Debtor filed with this Court a voluntary petition  
27 for relief under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and  
28 managing its property as a debtor and debtor in possession pursuant to sections 1107(a) and 1108 of

the Bankruptcy Code. No request has been made for the appointment of a trustee or an examiner in this case. No official committee of unsecured creditors has been appointed by the Office of the United States Trustee.

**B. The Lease**

The Debtor is the lessee under the Lease, dated September 20, 2012, with the Lessor for the Premises. The term of the Lease is thirty years commencing on October 15, 2012. The Debtor has vacated the Premises and delivered all keys and/or security codes, as applicable, to the Lessor.

The original monthly base rent under the Lease was \$4,680. As of the Petition Date, pursuant to rent adjustments under the Lease, the monthly base rent is approximately \$7,800.

The Premises are located on the Debtor's campus and were used prior to the Petition Date in connection with the Debtor's operation of the Livermore Valley Charter School for administrative purposes, including as office space for the school's psychologist and to conduct meetings with students' parents regarding individualized education plans. The Debtor had originally planned to use the Premises for after-school day care or administrative offices, but the Premises are not properly retro-fitted and the use of the Premises as a school would have required the Lessor's consent in any case.

**C. Abandonment of Personal Property, if any, Remaining on the Premises**

The Debtor has inspected all of its personal property located at the Premises and has removed any property deemed to be of value or that will be used in continuing operations during the chapter 11 case. To the extent that any property of the Debtor's estate remains at the Premises, retention of such property either would be burdensome to the estate or is of inconsequential value to it. Therefore, the Debtor seeks an order rejecting the Lease and authorizing the abandonment of personal property of the Debtor's estate, if any, remaining at the Premises.

**IV.**

**MEMORANDUM OF POINTS AND AUTHORITIES**

Section 365(a) permits a debtor to assume or reject an executory contract or unexpired lease upon the authority of the Court after notice and a hearing. The question of whether a contract or lease should be rejected, and, if not, on what terms it should be assumed, is one of business

1 judgment. *See Group of Institutional Investors v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*,  
2 318 U.S. 523, 550 (1943), rehearing denied, *Group of Institutional Investors v. Abrams*, 318 U.S.  
3 803 (1943). Under the Bankruptcy Code, most courts have applied the business judgment test to the  
4 decision to assume or reject a contract or lease. *See Orion Pictures Corp. v. Showtime Networks,*  
5 *Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993); *Richmond Leasing Co. v.*  
6 *Capital Bank N.A.*, 762 F.2d 1303 (5th Cir. 1985); *see also Agarwal v. Pomona Valley Med. Group,*  
7 *Inc. (In re Pomona Valley Med. Group, Inc.)*, 476 F.3d 665, 670 (9th Cir. 2007); *Durkin v. Bendor*  
8 *Corp. (In re G.I. Indus., Inc.)*, 204 F.3d 1276, 1281 (9th Cir. 2000) (“a bankruptcy court applies the  
9 business judgment rule to evaluate a trustee’s rejection decision”). The Ninth Circuit Bankruptcy  
10 Appellate Panel has stated the standard by which debtors should exercise their business judgment as  
11 follows: “What are the criteria which the court and the trustee [debtor in possession] should  
12 legitimately consider in exercising their ‘business judgment?’ The primary issue is whether  
13 [assumption or] rejection would benefit the general unsecured creditors.” *Robertson v. Pierce (In re*  
14 *Chi-Feng Huang)*, 23 B.R. 798, 801 (9th Cir. B.A.P. 1982).

15 Rejection of an executory contract is appropriate where rejection of the contract would  
16 benefit the estate. *See Sharon Steel Corp. v. Nat’l Fuel Gas Distribution Corp. (In re Sharon Steel*  
17 *Corp.)*, 872 F.2d 36, 40 (3d Cir. 1989). The standard for rejection is satisfied when a trustee or  
18 debtor has made a business determination that rejection will benefit the estate. *See Commercial Fin.*  
19 *Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.)*, 47 B.R. 425, 427 (D. Haw. 1985)  
20 (“under the business judgment test, a court should approve a debtor's proposed rejection if such  
21 rejection will benefit the estate.”).

22 Rejection of the Lease, as proposed herein, is well within the business judgment rule and will  
23 benefit the estate. The Premises have been vacated and are of no further use to the Debtor. Rejection  
24 will benefit the estate because it frees it from burdensome obligations that do not promote a  
25 successful reorganization of the Debtor. *National Labor Relations Board v. Bildisco & Bildisco*, 465  
26 U.S. 513, 528, 104 S. Ct. 1188, 1997 (1984); *see also In re Rega Properties, Ltd.*, 894 F.2d 1136,  
27 1140 (9th Cir. 1990).

1 It is settled in the Ninth Circuit that a bankruptcy court may approve retroactive rejection of  
2 executory contracts or unexpired leases. In *In re At Home Corp.*, 392 F.3d 1064, 1065 (9th Cir.  
3 2004), the Ninth Circuit held, in approving rejection of a nonresidential property lease, that  
4 retroactive rejection is within a bankruptcy court's equitable powers "when 'necessary or appropriate  
5 to carry out the provisions of' § 365(d)." *Id.* at 1071; *see also* 10 COLLIER ON BANKRUPTCY ¶  
6 6006.01[3] (16th ed. rev. 2011) (noting that the "new majority view" is to allow "retroactive  
7 application of an order of rejection, back to the date that the motion was filed, based on equitable  
8 considerations.").

9 Here, it is inequitable for the Debtor, who has abandoned the Premises, to continue to incur  
10 administrative rent liability for the Lease, which provides no value to the estate. In addition, the  
11 Debtor has requested that the Motion be heard on shortened time; therefore, the duration for which  
12 an order approving this Motion will relate back, is limited. Under these circumstances, the Debtor  
13 respectfully submits that the equities favor the Court's granting of the relief requested in this Motion,  
14 effective as of the Petition Date.

15 In the process of vacating the Premises, the Debtor has removed all personal property that  
16 would have any value in continuing further operations of the Debtor. All remaining personal  
17 property at the Premises, if any, represents a burden, or is of no or inconsequential value to, the  
18 estate and should be abandoned pursuant to section 554(a) of the Bankruptcy Code.

19 **V.**

20 **REJECTION CLAIM BAR DATE**

21 In connection with the rejection of the Lease, the Debtor also requests that this Court,  
22 pursuant to Bankruptcy Rule 3002(c)(4), establish the later of (a) 30 days after entry of an order  
23 granting this Motion or (b) the deadline set by the Court for prepetition claims to be filed, as the  
24 deadline for filing a claim arising from rejection of the Lease.

25 **WHEREFORE**, the Debtor prays that this Court enter an order as follows:

- 26 1. Approving the rejection of the Lease;  
27 2. Deeming the Lease to be rejected effective as of the Petition Date;  
28

1           3.       Authorizing the abandonment of any personal property of the Debtor's estate  
2 remaining at the Premises;

3           4.       Establishing the later of (a) 30 days after entry of an order granting this Motion or (b)  
4 the deadline set by the Court for prepetition claims to be filed, as the deadline for filing a claim  
5 arising from rejection of the Lease; and

6           5.       For such other and further relief as the Court deems just and proper.

7 Dated: November 8, 2016

PACHULSKI STANG ZIEHL & JONES LLP

9 By: /s/ John Lucas

10 Jeffrey N. Pomerantz

11 Debra I. Grassgreen

12 John W. Lucas

13 Proposed Attorneys for Debtor and Debtor in  
14 Possession

**EXHIBIT A**  
**Proposed Order**

Jeffrey N. Pomerantz (CA Bar No. 143717)  
Debra I. Grassgreen (CA Bar No. 169978)  
John W. Lucas (CA Bar No. 271038)  
PACHULSKI STANG ZIEHL & JONES LLP  
150 California Street, 15<sup>th</sup> Floor  
San Francisco, California 94111-4500  
Telephone: 415.263.7000  
Facsimile: 415.263.7010  
Email: jpomerantz@pszjlaw.com  
dgrassgreen@pszjlaw.com  
jlucas@pszjlaw.com

Proposed Attorneys for Debtor and  
Debtor in Possession

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

In re:  
Tri-Valley Learning Corporation,<sup>1</sup>  
Debtor.

Case No.: 16-43112-CN  
Chapter 11

**ORDER AUTHORIZING (1) REJECTION  
OF NON-RESIDENTIAL REAL  
PROPERTY LEASE LOCATED IN  
LIVERMORE, CALIFORNIA, AND (2)  
ABANDONMENT OF REMAINING  
PERSONAL PROPERTY**

Tri-Valley Learning Corporation (“**TVLC**” or the “**Debtor**”), the above-captioned debtor and debtor in possession, having filed its *Motion to for Entry of Order Authorizing (1) Rejection of Non-Residential Real Property Lease Located in Livermore, California, and (2) Abandonment of Remaining Personal Property* (the “**Motion**”); the matter having come on for hearing on shortened notice in the above-referenced Bankruptcy Court, the Honorable Charles Novack, United States Bankruptcy Judge, presiding; the Debtor having appeared by counsel; other appearances were as noted on the record; the Court having reviewed the pleadings filed in support of the Motion; no objection to the Motion having been made; the Court finding that notice of the hearing on the Motion is appropriate in the particular circumstances; the Court being fully advised in the premises and good cause appearing therefore;

<sup>1</sup> The last four digits of the Debtor’s tax identification number is (4585). The location of the Debtor’s service address is 3252 Constitution Drive, Livermore, CA 94551.



**IT IS HEREBY ORDERED** that:

1. The Motion is GRANTED;

2. The Debtor is authorized to reject the Lease for the Premises, pursuant to section 365 of the Bankruptcy Code.

3. The Lease is deemed to be rejected as of the Petition Date.

4. Any claim arising from the rejection of the Lease shall be filed on the later of (a) 30 days after entry of this Order or (b) the deadline set by the Court for prepetition claims to be filed, or such claims will be forever barred; and

5. All personal property remaining at the Leased Premises is, pursuant to section 554(a) of the Bankruptcy Code, hereby abandoned by the Debtor to the Lessor of the Premises, who is hereby permitted to exercise its rights and remedies relative to such personal property pursuant to applicable non-bankruptcy law.

**\*\*END OF ORDER\*\***